SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 97

RALPH PICCIRILLO,

Petitioner,

v.

NEW YORK,

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

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POINT I

(Answering Respondent's POINT I pp. 7-20)

Respondent concedes that the rule in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), would require the application of a transactional immunity standard to this case, but argues that in view of the extension of Fifth Amend-

ment protections to the states by *Mallov v. Hogan*, 378 U.S. 1 (1964), this traditional rule of immunity should be changed. It is surely a novel rule of constitutional law to say that where the protections of a constitutional provision have been extended to the states, the quality of that protection must therefore be diminished in order to accommodate conflicting state and federal interests.

Of course, the first and easiest answer to respondent's position is that the problems he suggests do not arise in the case at hand. This case does not deal with the effect of a state immunity grant on a federal proceeding, or upon proceedings in another state, but rather with the effect of a state immunity grant within the granting jurisdiction.

While we urge that this is a sufficient reply, should this Court determine to meet the question so broadly framed by respondent at this time, it can be dealt with easily without decreasing the traditional protection afforded by the Fifth Amendment.

Petitioner would readily concede that there is a serious question whether a state jurisdiction could constitutionally guarantee transactional immunity with respect to prosecutions in other jurisdictions. *Murphy v. Waterfront Commission*, 378 U.S. 52, 93 (1954). We also recognize that the interests of various jurisdictions may differ with respect to any particular witness or investigation. However, we submit that the only rule consistent with traditional principles of the Fifth Amendment would be one that would require the jurisdiction compelling the testimony to grant transactional immunity within its borders, while prohibiting other jurisdictions from using the compelled testimony or its fruits.

Respondent argues that a change in the traditional scope of protection afforded by the Fifth Amendment is necessary under *Mallov v. Hogan*, *supra*, because of a line in that decision which states that uniform standards under the Fifth Amendment must be applied to the states. 378 U.S. at 11. This sentence, in context, indicates nothing other than that uniform standards are to be adhered to when deciding

when the Fifth Amendment may properly be invoked by a witness. In fact, the uniform standard of *Malloy* was designed to insure that the full protections of the Fifth Amendment would be available to witnesses in all proceedings. It would be anomalous to now use that concept to limit the scope of that protection. Uniformity can be ensured by requiring each jurisdiction to protect its own witnesses from prosecution and by preventing each jurisdiction from using testimony (and its fruits) compelled by another jurisdiction.

Neither can respondent take comfort from the fact that *Malloy* overruled the dual-sovereignties doctrine. Respondent argues that since *Counselman* was decided at a time when the dual sovereignties concept was valid, its principles are therefore no longer applicable. In the first instance, this position is historically inaccurate. The *Counselman* decision makes no mention of the dual sovereignties concept, and there is nothing in that decision to indicate that its holding was premised on it. In fact, the first intimation of the doctrine's existence occurred in *Jack v. Kansas*, 199 U.S. 372 (1905), where the Court rejected an argument that a state immunity statute was constitutionally defective because it failed to grant immunity from federal prosecution. The decision in *Jack* appears equally based on the finding that the likelihood of a federal prosecution was remote [199 U.S. at 381], and it was not until *United States v. Murdock*, 284 U.S. 141 (1931), that the doctrine of dual sovereignties was clearly enunciated.* See also, Grant, *Federalism and Self-Incrimination*, 4 U.C.L.A. L. Rev. 549 (1957). Thus, the rule of *Counselman* was not, as respondent contends, specifically formulated during a

*As the court wrote in the second *Murdock* case, "Not until this Court pronounced judgment in *United States v. Murdock*, 284 U.S. 141 . . . had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law." *United States v. Murdock*, 290 U.S. 389, 396 (1933).

period when the dual sovereignties concept was in existence and therefore inappropriate in light of *Mallory* and *Murphy*.

Secondly, the overruling of the dual sovereignties concept was designed to extend the application of the Fifth Amendment, and should not now be used as a rationale for limiting its protection.

Respondent seeks to solve the problems he suggests by lessening the scope of protection traditionally afforded by the Fifth Amendment. As indicated above, his reasoning is not supported by either logic or precedent. Moreover, such a solution is not only contrary to the spirit of the Fifth Amendment, but is also unnecessary.

Full effectuation of the privilege, with due accommodation of potentially conflicting state and federal interests, requires no more than that the jurisdiction which has abrogated the witness' constitutional rights offer in return the fullest protection it can within its own borders, with other jurisdictions simply precluded from use of such compelled testimony or fruits thereof. *Murphy v. Waterfront Commission, supra*, 378 U.S. at 79; cf. *Elkins v. United States*, 364 U.S. 206, (1960). Such a rule would surely present no hardship for the jurisdiction which has compelled the testimony. Presumably that jurisdiction would be in a position to make a judgment as to the relative importance of the witness' testimony and of a prosecution against that witness. The jurisdiction would have full control over such a determination and, having intentionally determined to deprive a witness of his privilege against self-incrimination, it would bear the burden of making him whole. On the other hand, the jurisdiction which had not participated in this decision would not be bound by it except to the extent of being prohibited from using the compelled testimony or its fruits.

Nothing in the several opinions in *Murphy* and *Stevens v. Marks*, 383 U.S. 234 (1966), militates against this application of the Fifth Amendment. The concerns expressed by Mr. Justice White and Mr. Justice Stewart in *Murphy*,

and by Mr. Justice Harlan and Mr. Justice Stewart in *Stevens* applied only to inter-jurisdictional situations. As pointed out above, there is nothing in this Court's prior decisions which requires the application of a transactional immunity rule which would have extraterritorial effect.

If the Court is concerned with the inter-jurisdictional application of the Fifth Amendment at this time, a much more realistic result than the one respondent suggests is one which merely requires that that jurisdiction which has made a reasoned determination to abrogate a witness' constitutional rights be bound to fully protect that witness. In this way, the Fifth Amendment would retain its vigor and meaning, while an accommodation of the interests of different jurisdictions would be achieved.

However, although we believe that the rule set forth above is fully consonant with traditional interpretations of the Fifth Amendment and avoids the difficulties foreseen by the respondent, we reiterate that the instant case does not necessitate a consideration of the effect on other jurisdictions of a grant of immunity by one jurisdiction in our federal system. As pointed out in our main brief, the Fifth Amendment requires that the jurisdiction which has compelled immunity must grant the witness' transactional immunity. This was not done in this case, and therefore petitioner's conviction must be reversed.

POINT II

(Answering Respondent's POINT II pp. 20-27)

Petitioner has argued that his testimony was used by the Grand Jury in handing down the bribery indictment, or that there is a strong possibility that it was so used. In opposition to this contention, respondent has argued that "the testimony of Patrolman Sewell was complete in and of itself" because Sewell was an eyewitness to the assault and testified that "he saw the assault occur" (Resp. Brief, p. 21). This position is not well founded in the record.

A reading of Sewell's grand jury testimony reveals that he never testified concerning the assault. The only relevant testimony on this point was as follows:

> Q. Now, did an incident occur on that day which caused you to give chase and place under arrest one Anthony La Bello and one Ralph Picirillo.
>
> A. Yes.
>
> Q. Did you apprehend the two defendants?
>
> A. I did.
>
> (R. 58)

In fact, it clear from Sewell's testimony at the trial that he did not witness the assault at all. He testified as follows:

> At approximately between 9:15 and 9:30, I was standing in front of our headquarters. I saw a fellow run across the street, and I saw another gentleman coming across the same street covered with blood. The first fellow, as he came out, he said he just saw two men assault the man who was covered with blood, and he pointed them out to me. I immediately
>
> Q. Who was pointed out to you, if you now know.
>
> A. The two defendants.
>
> Q. Would you point them out and name them if you can.
>
> A. Anthony Labello and Ralph Picirillo.
>
> Q. How far were they from you at the time you first saw them?
>
> Q. They were running through the project, which is across the street, and a little ways into the project. (R. 73)

Thus, contrary to respondent's assertion, Sewell's testimony was not complete in and of itself. Even if it had been complete, however, petitioner's argument would not be any the weaker since it is based not upon the quality of Sewell's testimony but upon the high probability that the grand jury, in determining whether to credit Sewell's testimony and whether to indict, relied, in part, on the testimony of petitioner.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner prays that the judgment below be reversed.

Respectfully submitted,

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